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ALEXANDER L. STEVAS,
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NO. 81-523

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONTAINER CORPORATION OF AMERICA, APPELLANT

v.

FRANCHISE TAX BOARD, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT

MEMORANDUM BY CATERPILLAR TRACTOR CO., ET AL. IN OPPOSITION TO SECOND MOTION OF APPELLANT TO EXPEDITE NOTING OF PROBABLE JURISDICTION

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Caterpillar Tractor Co., et al. [Caterpillar], Appellee in Chicago Bridge & Iron Company v. Caterpillar Tractor Co., et al., No. 81-349, by Don S. Harnack, their attorney, respectfully oppose the Second Motion of Appellant [Container] to Expedite Noting of Probable Jurisdiction in No. 81-523 and to defer the decision in No. 81-349.

Container submits that "the fairest course of action to all parties" is to defer the decision in the Chicago Bridge & Iron v. Caterpillar case until this Court has heard the Container case. Caterpillar respectfully disagrees with Container's appraisal of what is "fair." The record in the Chicago Bridge & Iron v. Caterpillar case establishes that, without regard to the allegations by Chicago Bridge & Iron or Container, Caterpillar's income fairly apportionable to Illinois can only be determined by use of combination.

This Court's decision that Container is not wholly unitary or that combination does not properly apportion Container's income to California would not impact upon the constitutional propriety of the application of combination to Caterpillar. Caterpillar assumed and sustained the heavy burden of proof proscribed in Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931) when establishing its right to use combination. It is respectfully submitted that there is no basis to justify the deferral of this Court's decision in the event this Court chooses to note probably jurisdiction in the Container case.

Container concedes at page 2 of its motion that a case in controversy exists in the Chicago Bridge & Iron v. Caterpillar case, but suggests that the record is inadequate to present the constitutional issues with "sufficient clarity." This Court has before it sufficient submissions by Container to demonstrate that the only material differences between the two records are:

> (1) Caterpillar has established it is a worldwide unitary enterprise while Container urges that it is not unitary and combination "will violate the Due Process and Commerce clauses in many instances because the parent corporation [Container] and its foreign subsidiaries are not engaged in a unitary business." [Brief Amicus Curiae On The Merits In Support of Appellant, Submitted On Behalf of Container Corporation of America, p. 4]
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> (2) Caterpillar has established that combination is the only method that fairly determines its income apportionable to Illinois while Container has submitted evidence which has, so far, been found to be inadequate to establish (a) Container and some or

all of its subsidiary operations are not unitary, (b) combination has resulted in an unreasonable apportionment of income to California, or (c) Container is entitled to statutory relief as provided by the California Revenue Code.

(3) Both Caterpillar and Container are domestically controlled groups of multi-national taxpayers. The record in both cases establishes without exception that combination applied to domestically controlled multi-national taxpayers does not offend our foreign trading partners. Additionally, the records in both Chicago Bridge & Iron and Container contain no evidence establishing the likelihood or possibility of the "impairment of federal uniformity" or an interference with the Federal Government's ability to "speak with one voice" in connection with foreign commerce.

(4) Neither the Chicago Bridge & Iron nor the Container record establishes either double taxation or the enhanced risk of double taxation by clear and cogent evidence. In any event this Court can and would rectify double taxation if established in an individual case. Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980).

Caterpillar respectfully submits that the record, briefs and oral arguments in the Chicago Bridge & Iron case furnish this Court with an adequate basis to sustain the decision of the court below. If this Court wishes, the record in the Chicago Bridge & Iron case furnishes an opportunity to clarify this Court's prior decisions and to respond to those arguments which would severely limit such decisions.

If this Court chooses to reconsider the constitutional issues raised by Chicago Bridge & Iron in the context of the record created by Container, Caterpillar respectfully submits that the "fairest course of action" is to dismiss Chicago Bridge & Iron's appeal or to affirm the decision of the Illinois Supreme Court without plenary consideration. This course of action would grant to Caterpillar the relief to which it is entitled without jeopardizing Chicago Bridge & Iron's right to establish that combination would result in an unconstitutional apportionment of income to Illinois on its particular facts.

Respectfully submitted,

Don S. Harnack/s

DON S. HARNACK
Attorney for Appellees,
Caterpillar Tractor Co., et al.

April 29, 1982

CERTIFICATE OF SERVICE

This is to certify that a copy of Caterpillar Tractor Co.'s Objections to the Second Motion of Appellant to Expedite Noting of Probable Jurisdiction was served this 29th day of April, 1982, by first class mail, postage prepaid, upon:

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